IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1039

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

IN PROCEEDINGS FOR THE
REORGANIZATION OF A RAILROAD

TWENTY-ONE RETIRED EMPLOYEES,
Petitioners

v.

TRUSTEES OF PENN CENTRAL
TRANSPORTATION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 21, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, and the opinion of the District Court for the Eastern District of Pennsylvania, not yet reported, appear in Appendix A and B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 21, 1973. A timely Petition for Rehearing en banc was denied on October 9, 1973, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

United States Code, title 11:

§205(b)(5): . . . For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors.

QUESTIONS PRESENTED

1. Whether, under the equitable receivership principles which apply during a Section 77 Reorganization of a national railroad, retired employees of the debtor should continue to receive payments under a retirement plan adopted by the railroad to encourage employees to remain in its employ until retirement, where under the plan most of petitioners' salary increases since 1952 were invested by the railroad at petitioners' risk and their share of the appreciated or depreciated investment was to be paid to them in ten (10) annual installments beginning at age 65.

2. Whether such a plan, the terms of which were adopted and implemented by the debtor's Board of Directors unilaterally, should be treated as a series of separate contracts for deferred compensation giving each retired employee only the rights of general contract creditors, or as an established retirement plan, payments under which are deemed operating expenses of the railroad which must continue during reorganization.

3. Whether, absent any evidentiary basis regarding the needs and existing financial commitments of the retired employees, a dollar ceiling may be placed on the aggregate amount they received from the funded and unfunded retirement programs of the debtor.

STATEMENT OF THE CASE

1. Petitioners are 21 retired employees of the Pennsylvania Railroad and its successor, Penn Central Transportation Company, almost all of whom retired during the decade *before* the 1970 reorganization of the debtor. The number of years they were employed, the dates of their retirements and their present ages are as follows:

Name	*No. Yrs. Employed*	*Date of Retirement*	*Present Age*
1. Carpi	48	1965	Dec'd, widow is beneficiary
2. Cousins	40	1966	73
3. Cranwell	35	1961	Dec'd, widow is beneficiary
4. Ewalt	27	1963	63
5. Fair	45	1969	68
6. Jones	41	1968	68
7. Kohout	35	1971	59
8. Marine	49	1963	76
9. Morris	41	1967	68
10. Nancarrow	42	1962	76
11. Newell	36	1963	71
12. Patchell	48	1963	76
13. Pevler	32	1959 (took leave to become Pres. of Wabash Ry.)	70
14. Prizer	33	1969	64
15. Roberts	34	1971	61
16. Schroeder	33	1969	68
17. Smucker	41	1970	66
18. Symes	47	1963	76
19. Henry	47	1966	73
20. Smith	39	1965	67
21. Tackbary	14	1970	68

2. In 1952, the Board of Directors of the Pennsylvania Railroad adopted, and *imposed upon* all non-union employees earning $30,000 or more a year, its Contingent Compensation Plan (Plan) (Appendix D hereto). Under that Plan, "[w]hen cash salary increases were granted to union employees or to non-union employees not included in the Plan, the qualifying participants were awarded comparable adjustments in compensation, but not in cash" (Judge

Gibbons' Opinion, Appendix A at A4). Instead, such salary increases were placed in a Fund for investment. Upon retirement of a participant, his interest in the Fund was transferred to another Fund for more conservative investment and he would receive ten (originally four) annual installments of his interest in the Fund, as appreciated or depreciated by investment.

3. Almost none of the petitioners served on the Board of Directors. They were never asked to approve this arrangement under which their salary increases for the last 10 to 15 years of their employment were to be invested in the securities market entirely at their own risk.

4. Until 1961, the Plan provided for forfeiture if a participant left the Railroad's employ. Petitioners remained with the Railroad until their respective retirements and many of them did so in order not to forfeit their salary increases of many years.[1]

---

1. A fuller description of petitioners' reliance upon the periodic receipt of their salary increases follows (the facts referred to are not disputed and are derived from the petitioners' employment records and affidavits, all of which are in the record below): Almost without exception, the petitioners went to work for the Pennsylvania Railroad as their first full time job and retired never having worked for another employer in their entire adult lives. The typical petitioner was born about 1900, went to work for the Railroad at age 17 as an assistant station agent or as a rodman for .40 or .50 cents an hour, moved every several years from one city to another, all over the United States. By 1952, when the Plan began, he had been employed by the company for between 30 and 35 years and was earning just over $30,000 a year in one of the top supervisory positions of the nation's largest railroad. For the next 13 years, he earned less cash salary, measured in real dollars, than before, for his cash salary rose at a much slower rate than did the cost of living, most increments having been made in the form of contingent compensation allotments. He retired in 1965, after between 43 and 48 years of service, having completed his estate and retirement plans for himself and his family. The contingent compensation payments played a major role in those plans. In view of the expected payments, it seemed perfectly prudent to some of them to

5. The court below approved in essence the trustees' proposal under which those participants who, since retirement, had received annual allotments from the Fund equal

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Note 1—*Continued*

elect to take the larger pension (under the funded pension plan of the railroad) which ceased at death rather than the smaller, which continued, in reduced amount, to their widows. Now two of them have died. Their widows receive no pension, except the small statutory Railroad Retirement benefit. Until 1970 they depended upon the periodic contingent compensation payments; since 1970 they have not received that either, and one of the widows has virtually no other source of income.

Some stopped purchasing insurance when they became part of the Plan. One had purchased additional policies every time he received a promotion, but never purchased another after 1952, when his allotments began.

Some turned down offers to become the president of other major American industries at much higher salaries, because the Plan made voluntary termination a cause for forfeiture. (The stated purpose of the Plan was to "encourage" employees "to continue in the company's employ" and "to insure that the services of such individuals will not be available to competitors").

Others retired early, confident that their contingent compensation would be sufficient for them until their pension payments began at age 65. Now they are in their Florida homes in retirement, having sold their homes in Philadelphia, too young for a pension and too old for a job.

Still others created irrevocable trusts for children and grandchildren and irrevocably invested into the trusts large sums of money—far beyond what they would have given away but for the anticipated contingent compensation.

One entered into a property settlement agreement with his wife (they were divorced immediately thereafter) and undertook very large annual payments to her, which will be reduced by $7,500 per year in 1977, the year the contingent payments were expected to stop. The trustees have stopped the payments, but his payments to his former wife must continue.

The employment years of these petitioners are over. There is no way to change that. It is too late for them now to change their pension plans so that their widows will be protected, or to purchase insurance for the protection of their families, or to accept the attractive jobs they once confidently turned down, or to take back the irrevocable gifts they have made. Their reliance was reasonable.

to the principal amounts of their invested salary increases, would receive no further payments during reorganization and would be relegated to the status of general creditors for the balance of their claims; and those participants who had not yet been repaid the principal amounts of their salary increases would, during reorganization, be paid annual allotments until they had received back such principal amounts. An example of the result is as follows: Petitioner John D. Morris became part of the Plan in 1953, when he was made General Manager of the Railroad's Western Region. From 1953 to 1967, $75,448.84 in salary increases (which were never more than the percentage salary increases granted to union and other non-union employees) were put into the Fund instead of being paid to him. In 1967, 15 years after the investment of his salary increases began, he retired, as a Vice-President of the Railroad. He then received three annual payments from the Fund, in 1967, 1968 and 1969. These totaled $83,624.15. As appreciated by investment over several decades, his remaining equity in the Fund was $146,392.86 as of December 31, 1970. Under the Trustees' proposal, as approved by the Court below, he would receive no further payments—*neither interest on the original investment nor the appreciation thereof*—because he had already received back the principal of his original investment.

6. The Court of Appeals affirmed the District Court as follows:

> In *Bowen v. Hockley*, 71 F.2d 781, 785-86 (4th Cir. 1934), the practice [of continuing payment of unfunded pension liabilities during reorganization of a railroad] was justified on the ground that the pen-

During the several generations that these men served the railroad, there had been a number of railroad reorganizations, and they knew that. Petitioner Smucker, for one, has served as a trustee in a railroad reorganization. But in none of those reorganizations has a retirement program, funded or unfunded, been disaffirmed.

sioners' past service helped to create and preserve the estate being administered. Apparently payment of unfunded pension liabilites during a railroad reorganization is a recognized tradition in the industry. * * * This court has not explicitly ruled on the practice. Since no party to this appeal challenges it, we accept it, for present purposes, as a governing rule. * * *

The appeal deals only with the district court's rejection of appellants' contentions as to their present rights in the Contingent Compensation Reserve Fund. [This is not entirely correct. Appellants contended that during reorganization they were entitled to the payments either out of the Fund or out of the debtor's general estate.] These contentions are:

* * *

(3) that the reduction in benefits resulting from the refusal of the court to give effect to appreciation in the Fund beyond the original allotments is inconsistent with the practice, referred to above, of recognizing pension liabilities during a railroad reorganization;

* * *

Accepting the principal of *some* payment of unfunded pension liabilities [that is *not* the principal enunciated in *Bowen v. Hockley, supra*], no more is required than a responsible exercise of equitable discretion. We find no abuse of discretion in Order No. 1087. (Bracketed materials and emphasis our own) Appendix A, A8-9.

7. The Court of Appeals additionally held as follows in respect of the lower court's determination that no retiree receive annually an aggregate of more than $50,000 from the various retirement programs of the debtor:

What we have said about the Court's equitable discretion with respect to the treatment of payments based

upon appreciation in the Contingent Compensation Reserve Fund applies as well to the $50,000-a-year limit. The district court found as a fact that this level of pension would afford each of the participants a decent living standard. [There was no testimony, documentary evidence or stipulated fact upon which the district court could have based that exercise of discretion]. We will not second guess his well-considered judgment that no more was appropriate during the pendency of the reorganization. (Bracketed materials our own) Appendix A, A10.

REASONS FOR GRANTING THE WRIT

1. In the courts below, petitioners argued that even if the Plan did not create a trust of any kind, and were regarded as an *unfunded* pension plan, nevertheless during the reorganization of national railroads unfunded pensions must be paid, and therefore the annual payments to these appellants (whether from the Fund or otherwise) should continue at least during reorganization. The principal case relied on for this latter proposition was *Bowen v. Hockley*, 71 F.2d 781 (4th Cir. 1934) where Judge Parker, referring to unreported railroad reorganization cases in five other circuits, said:

> Nevertheless it is held, *and we know of no holding to the contrary*, that operating receivers should continue the payment of old age pensions. Circuit Judge Pritchard of this court authorized the payment of such pensions in the first Seaboard Air Line Railway receivership in 1909, and Judge Groner authorized their payment in the present Seaboard receivership. Such payments have also been authorized in the Norfolk & Southern receivership in this Circuit, and in the receiverships of the St. Louis-San Francisco Railway Company, the Central of Georgia Railway Company, the Florida East Coast Railway Company, and the Brooklyn Rapid Transit Company in other Circuits. *Id.* at 785-86. (Emphasis supplied) (See full text of opinion for extensive discussion of equitable considerations undergirding the rule.)

Since *Bowen*, in the single case in which there was an attempt in reorganization to stop payments across the board on retirement programs, the Court promptly ordered that the payments be made. *In re Chicago and N. & W. Ry. Co.*, 35 F. Supp. 231, 255-56 (N.D. Ill. E.D. 1940).

Thus, this Court should grant certiorari because the decision of the court below creates a conflict among the Courts of Appeals in different circuits.

2. (a) Proposed legislative protection of the retirement benefits of superannuated employees is currently the subject of congressional scrutiny.[2] But with respect to national railroads, Congress has already delegated to the federal courts the responsibility of protecting the retirement benefits of railroad employees by granting a priority to those "unsecured claims which would have been entitled to priority if a receiver in equity of the property of debtor had been appointed by a federal court on the day of the approval of the petition." 11 U.S.C. §205(b)(5). Thus, equitable considerations as developed by federal courts constitute the sole protection of the retirement rights of old and economically useless former railroad employees. The humane and compassionate standards enunciated by Judge Parker in *Bowen v. Hockley, supra*, should remain the national standard of the federal courts.

(b) It is not "a responsible exercise of equitable discretion" during a railroad reorganization, and it is a sharp departure from the equitable approach following uniformly in other circuits,

(i) to deprive superannuated retirees, most of whom had never worked for another employer, of the appreciation on investments made entirely at their own risk under a plan, imposed upon them 20 years ago without their approval, whose forfeiture provisions locked them in as railroad employees until retirement. Had these investments in the securities market depreciated, petitioners would have borne the loss. They in fact appreciated, and the court below has permitted the trustees, not the petitioners, to receive the gain. By labeling such a "heads-I-win-tails-you-lose" result as a "responsible exercise of equitable discretion," the court below has set a pernicious precedent

2. H. R. 4200 passed the House in June, 1973 and the Senate in September, 1973. The Senate added on S.B. 4 and 1179. At the time this Petition was submitted for printing, the bills were expected to go into Conference Committee shortly.

in respect of the pension rights of the retired, which will affect the loyalties of the employees of national railroads by stripping aged, unemployable and no longer economically useful retirees of the judicial protection heretofore afforded them;

(ii) to deprive superannuated retirees even of legal *interest* on salary increases earned and invested two decades ago and to fail to take into account the dramatic decrease in the present value of 1952 dollars.

Thus, this court should grant certiorari to ensure that uniform standards are applied by federal courts in exercising equitable discretion in respect of the retirement rights of superannuated retirees of the nation's railroads.

3. The Contingent Compensation Plan is common among the nation's railroad companies.[3] "A railroad is a peculiar sort of property. . . . Whoever is undertaking to operate [a railroad] . . . must continue to do so, even at loss to itself, or the public will suffer." *Pennsylvania Steel Co. v. New York City Ry.*, 208 F. 168, 182 (S.D.N.Y. 1913), *aff'd.*, 216 F. 458 (2d Cir. 1914). In view of the already shaky financial condition of the nation's railroads and the fact that many of the key employees of such railroads have had their salaries invested in just such a Plan as is here involved, the decision of the court below, relegating such employees to the status of general creditors, will adversely affect the morale of such key employees throughout the country and thereby adversely affect the public interest.

4. Only two of these twenty-one petitioners are affected by the determination of the court below that no retiree receive annually an aggregate of more than $50,000 from

3. For example, before the merger of the Pennsylvania Railroad and the New York Central, *both* companies had such plans. See also, Washington and Rothschild, *Compensating the Corporate Executive*, at P. 111 (3rd Ed. 1962).

the several retirement programs of the debtor. That determination could not have been "a responsible exercise of equitable discretion" under Section 77, because it was made in the absence of any evidence of any kind that a specific figure constitutes an equitable ceiling in the particular circumstances of those individuals to whom it would apply.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1081, 73-1098, 73-1204, 73-1205,
73-1206, 73-1207 and 73-1208

In the Matter of: PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

TWENTY-ONE RETIRED EMPLOYEES,
Appellants in No. 73-1081,

DAVID C. BEVAN, *Appellant in No. 73-1098,*

ALFRED E. PERLMAN, *Appellant in No. 73-1204,*

STUART T. SAUNDERS, *Appellant in No. 73-1205,*

ARTHUR E. BAYLIS, A. M. HARRIS, HENRY W. LARGE, CHRISTY C. MAGRUDER, HERBERT M. PHILLIPS, GEORGE C. VAUGHAN, CAROL JEAN COLE, Executrix of Estate of JAMES B. GRAY, six retired employees and the estate of one retired employee of debtor,
Appellants in No. 73-1206,

ARTHUR J. GREENOUGH,
Appellant in Nos. 73-1207 and 73-1208.

(Bankruptcy No. 70-347)

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued May 14, 1973

Before: Van Dusen, Gibbons and Rosenn, *Circuit Judges*

OPINION OF THE COURT

(Filed August 21, 1973)

GIBBONS, *Circuit Judge.*

We here consider consolidated appeals from two orders, Nos. 1087 and 1088 of the Penn Central reorganization court, which deal with the continuation of payments to former Penn Central executives pursuant to several retirement programs. The district court's opinion on these orders is reported. *In the Matter of Penn Central Transportation Company, Debtor*, 354 F. Supp. 408 (E.D. Pa. 1973). Twenty-eight retired Penn Central employees have appealed. The appeals present as issues:

(1) common to all appellants, the propriety of the district court's conclusion that assets held in Penn Central's Contingent Compensation Plan (CCP) became, on the filing of the petition for reorganization, property of the trustees in reorganization, leaving appellants as creditors holding unsecured claims for deferred compensation;

(2) common to six appellants,[1] the propriety of the district court's ruling that the reorganization court would continue payments under the Contingent Compensation Plan as expenses of operation of the reorganization, but with a limitation that total pension payments from the Penn Central Plan for Supplemental Pensions[2] and Penn Central unfunded retirement programs,[3] including the Con-

1. Symes, Greenough, Bevan, Saunders, Smucker and Perlman.

2. The Plan for Supplemental Pensions is a funded retirement plan. Order No. 278 held that the trustees had no interest in the fund. Order No. 1087 authorizes the trustees to continue the Plan in existence, making the necessary employer contributions. There is no appeal from this feature of Order No. 1087.

3. These include two supplementary benefit arrangements of the New York Central, and the New Haven pension plan which

tingent Compensation Plan, would not exceed $50,000 a year to any former employee; and

(3) in the case of Symes, the application of the $50,000-a-year limitation not only to his claim under the Contingent Compensation Plan, but also to his claim under a $10,000-a-year special pension awarded to him by the Penn Central Board of Directors on October 23, 1968. Mr. Symes' case will be dealt with separately hereinafter.

The Contingent Compensation Plan was established by the Board of Directors of the former Pennsylvania Railroad in 1952, was continued after the 1968 merger with New York Central, and was amended, unilaterally, by the Board of Directors from time to time thereafter. When cash salary increases were granted to union employees or to non-union employees not included in the CCP, the qualifying participants were awarded comparable adjustments in compensation, but not in cash. Qualifying participants included employees earning $30,000 or more a year. In its preamble the CCP contains this general description:

> "As more fully described below, the Board of Directors, from time to time, may allot to any employe an amount representing contingent compensation subject to the terms and conditions set forth herein. At the discretion of the Board an amount equivalent to such allotment, or any part thereof, may be transferred to a reserve fund and invested; and to the extent of such transfer, the payments to a participant shall be measured by the value of the reserve fund. However, the assets held in the reserve fund will at all times be available for any corporate purpose.

Penn Central assumed in the 1968 merger, an Interim or Early Retirement Plan designed to encourage attrition of the labor force, and additional pension benefits for prior service at other railroads. Order No. 1087 authorizes the trustees to continue these plans in effect and to make all payments necessary to implement them. There is no appeal from this feature of Order No. 1087.

> After retirement the compensation contingently allotted to a qualifying employe will be paid to him in installments, subject to certain conditions. In the event of death, before or after retirement, payments will be made to the employe's beneficiary."

During the life of the CCP 164 employees were designated by a committee of the Board of Directors as qualifying participants. From 1952, when it was adopted, until June 21, 1970, when by Board action it was terminated, salary increases to the qualifying participants were made in the form of allotments to the CCP. The plan provided for periodic transfer of the allotments to a reserve fund for investment. The extent of such transfer payments to a participant would be measured by the value of the reserve fund. The participants' allotment units would be paid out after his retirement in annual installments, the amount of an installment being determined by reference to the value of his allotment units on the valuation date preceding the date of payment. The CCP contained forfeiture provisions applicable both before and after retirement. With respect to the reserve fund the CCP provided in relevant parts:

> "Section 401. The Board may authorize the establishment at any time of a Contingent Compensation Reserve Fund, hereinafter called the Fund. The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the Company. A participant shall have no right in or to any funds or property which may be held in the Fund.
>
> Section 1201. No participant nor any other person shall have any interest in any fund or in any specific asset or assets of the Company by reason of amounts contingently allotted to him, nor any right to receive any distribution under the Plan except as and to the extent expressly provided in the Plan. . . .

> Section 1401. . . . No consent of any participant shall be required, however, in connection with any amendment, suspension or termination of the Contingent Compensation Reserve Fund, which shall remain subject at all times to the unrestricted control of the Company."

From time to time Penn Central distributed to qualifying employees descriptive summaries of the CCP. Typical of the relevant language of such summaries is the description from the one dated October 11, 1969:

> "Either the contingent allotments or the Fund may be discontinued at any time at the discretion of the Board, however, in either instance employes' rights remain whole for the period prior to such termination date.
>
> The assets of the Contingent Compensation Reserve Fund remain assets of the Penn Central Transportation Company and subject to the rights of all creditors of the Company. No participant has any right to receive payments at any other times or in any other amounts than as provided by the Plan."

When, shortly before the filing of the petition for reorganization, the Penn Central directors terminated the CCP, the Contingent Compensation Reserve Fund contained in excess of $8.6 million. Of this sum, a substantial amount represented appreciation in the fund investments over the initial allotments made on account of the participants' services. Further appreciation took place after the filing of the petition for reorganization, so that when the district court made the rulings appealed from the Fund was valued at over $10 million.

Originally the trustees petitioned the reorganization court for authorization to disaffirm all obligations under the CCP and to expend the entire Contingent Compensation Reserve Fund for general railroad purposes. Thereafter, recognizing that such a result could adversely affect the

morale of those qualifying participants who were still employed by the railroad, the trustees filed a revised petition seeking approval of a proposed settlement with the CCP claimants. Under this proposed settlement, $2.6 million of the Fund balance would be placed in a reserve fund managed by an independent financial advisor and would be distributed to the participants in proportion to their allotment units, but with the value fixed at the amounts actually allotted but not yet received, or at the value of the pro rata shares of the Fund as of December 31, 1970, whichever was less, and all subject to a $50,000 limitation per person per year. The proposed settlement had other features which need not be alluded to because for a number of reasons the offer was withdrawn, and the matter proceeded to hearing on a revised trustees' proposal. That proposal was to liquidate the entire Fund, to use the entire Fund for operating expenses, but to pay the participants, as an administration expense, as cash permitted, the amounts proposed in the earlier settlement proposal. The trustees contemplated that such an undertaking by them would be conditioned upon the relinquishment by the participants of any rights to receive payments beyond their actual allotments (or their share in the Fund valued as of December 31, 1970, if that was lower).

The district court did not go so far as the trustees proposed. The court's conclusions here challenged were:

> "3. Participants in the Contingent Compensation Plan have no legal or equitable interest in or claim to the assets in the Contingent Compensation Reserve Fund. Each participant in the Contingent Compensation Plan has a valid claim for the full amount to which he is entitled under the terms of the Plan, but the Trustees should be authorized and directed to recognize such claims during reorganization only to the extent represented by the formula proposed by the Trustees in settlement (i.e., reimbursement of accrued allotments, or pro rata share of the Fund as of Decem-

ber 31, 1970, whichever was less); and such claims should be paid during reorganization only as cash permits. Unless and until otherwise ordered by this Court, the Trustees should set aside and reserve the sum of $2.6 million in order to meet these payments.

4. During reorganization, the Trustees should make no payments from the estate of the Debtor (whether by reason of unfunded retirement programs, or the Contingent Compensation Plan) where the effect of such payment would be that the aggregate amount received by a retired employee from all sources related to the Debtor (*i.e.*, the Plan for Supplemental Pensions, unfunded retirement programs, and the Contingent Compensation Plan) would exceed $50,000 per annum." 354 F. Supp. at 419.

This disposition of the Fund was implemented by Order No. 1088, and a stay was denied both by the district court and by this court. All but $2.6 million has now been expended for general railroad purposes. While Order No. 1088 provides that this sum be invested as a reserve to meet the payments to participants contemplated by the decision, it also provides:

> "Said reserve shall remain the property of the Trustees; establishment and maintenance of said reserve shall not give rise to any legal or equitable interest or claim therein on behalf of any participant."

Summarizing, then, the orders appealed from (1) relegated qualifying participants in the CCP to the status of unsecured creditors, to be dealt with in the plan of reorganization in some as yet undetermined manner, (2) authorized the trustees to treat the participants' claims as in the nature of unfunded pension liabilities and to pay these, in reduced amounts, as current operating expenses, and, (3) set aside from the $10 million Contingent Compensation Reserve Fund $2.6 million as a reserve from which to meet those operating expenses. The reserve was recognized to be a

matter of grace, however, and subject to reconsideration by the reorganization court.

It is common ground between the appellants and the trustee-appellees that in a railroad reorganization, some payment on account of unfunded pension liabilities by the trustees are properly treated as necessary and usual operating expenses and as a cost of doing business. In *Tate v. New York, New Haven & Hartford R.R.*, 332 F.2d 449 (2d Cir. 1964), the Second Circuit justified such payments as necessary to preserve the morale of present and future employees. In *Bowen v. Hockley*, 71 F.2d 781, 785-86 (4th Cir. 1934), the practice was justified on the ground that the pensioners' past services helped to create and preserve the estate being administered. Apparently payment of unfunded pension liabilities during a railroad reorganization is a recognized tradition in the industry. *See* Myers, *Financial Impact of Pension Costs on the Railroad Industry*, 7 Lab. L.J. 265, 266 (1956). *Compare In re Compania De Los Ferrocarriles De Puerto Rico*, 76 F. Supp. 521 (D.P.R. 1948). *Cf. Alpert v. New York, New Haven & Hartford R.R.*, 348 F.2d 304 (2d Cir. 1965) (distinguishing deferred compensation contracts from pensions). This court has not explicitly ruled on the practice. Since no party to this appeal challenges it, we accept it, for present purposes, as a governing rule. Nor do we reach in this case any issue as to the ultimate priority, if any, to which the CCP claimants may be entitled in a reorganization plan. This appeal deals only with the district court's rejection of appellants' contentions as to their present rights in the Contingent Compensation Reserve Fund. These contentions are:

> (1) that the CCP should be regarded as a funded rather than as an unfunded pension plan, (or as the trustees prefer, deferred compensation plan) and that the trustees have no interest in the Fund;
>
> (2) that at least as to those participants who retired prior to termination of the CCP, their claims should be treated as vested and secured;

(3) that the reduction in benefits resulting from the refusal of the court to give effect to appreciation in the Fund beyond the original allotments is inconsistent with the practice, referred to above, of recognizing pension liabilities during a railroad reorganization; and

(4) that the $50,000 per annum ceiling on pension payments during reorganization is discriminatory and improper.

In support of their contention that the CCP should be regarded as a funded rather than an unfunded pension plan, appellants argue that the Contingent Compensation Reserve Fund was a trust; express, constructive, or resulting. The Plan provisions quoted above, the Plan as a whole, and all the documents in the record referring to it negate any intention on the part of the Pennsylvania or Penn Central Directors to create an express trust. *See* Restatement (Second) of Trusts §2 (1959). Since there was neither an express trust which failed nor a transfer of property paid for by another, there could be no resulting trust. Restatement (Second) of Trusts, Chapter 12 (1959). Had the Fund, while held by Penn Central, been held in a trust capacity, there would be room for argument that the reorganization trustees became constructive trustees. Restatement of Restitution §160 (1937). But where, as here, the Plan made clear that the Fund was held as a part of the company's general assets, subject at all times to its use and disposition, and subject to the claims of its creditors, there is no basis from which a constructive trust could be implied. The CCP was, as the district court found, nothing more than an executory contract calling for compensation after retirement.

Nor can any distinction be made between those participants retired prior to termination of the CCP and those still employed thereafter. The Plan itself makes no such distinction. Even the amount to be paid remains uncertain until the valuation date immediately prior to the payment. Moreover, the benefits remain forfeitable even after retire-

ment if the retiree does not refrain from activities adversely affecting the company's best interests. *Compare* the Plan *with Retirement Board v. McGovern*, 316 Pa. 161, 174 A. 400 (1934). But in any event, appellants' argument that their rights "vested" upon retirement is entirely beside the point. Their rights may well be "vested"; they are nevertheless unsecured. The issue remains: how should "vested" executory contract pension rights be treated during a railroad reorganization.

Accepting, as have the parties, the general principle that some payments of unfunded pension liabilities are a practical necessity if a railroad is to be successfully operated in reorganization, it does not follow that in applying the principle the reorganization court must enforce each executory pension contract exactly in accordance with its terms. We are dealing with the powers of a court of equity to deal practically with the ongoing problems of employee morale, retention and recruitment. Even looked upon as an equitable recognition of the contributions made to the creation and preservation of the estate, the practice does not necessitate confining the court to the straight jacket of the underlying contract. Indeed, one can envisage a situation where recognizing the exact terms of an unfunded pension contract might both have an adverse effect upon morale of present and future employees and be inconsistent with any contribution made to the debtor's estate. Accepting the principle of some payment of unfunded pension liabilities, no more is required than a responsible exercise of equitable discretion. We find no abuse of discretion in Order No. 1087.

What we have said about the court's equitable discretion with respect to the treatment of payments based upon appreciation in the Contingent Compensation Reserve Fund applies as well to the $50,000-a-year limit. The district court found as a fact that this level of pension would afford each of the participants a decent living standard. We will not second guess his well-considered judgment that no more was appropriate during the pendency of the reorganization.

Finally, there is the separate contention of appellant Symes that the court erred in refusing to continue payment, during reorganization, of a special pension of $10,000 a year voted by the Board of Directors on October 23, 1968. Order No. 1087 makes no final disposition of Mr. Symes' claim on this special arrangement, but it is subject to the overall limitation of $50,000 a year, and Mr. Symes' pensions from other Penn Central sources exceed this amount. For purposes of payment during reorganization, nothing distinguishes the October 23, 1968 unfunded pension contract from the other unfunded pension contracts dealt with in Order No. 1087.

We emphasize that because the parties agree that some payments on unfunded pension liabilities during a railroad reorganization are at least proper, this opinion has not dealt definitively with questions of the extent of or the limitations upon the reorganization court's power in this respect. We also emphasize that the orders appealed from do not determine how the appellants' claims should be dealt with in a plan of reorganization or a liquidation.

Orders No. 1087 and 1088 will be affirmed.

VAN DUSEN, *Circuit Judge*, dissenting in part:

I respectfully dissent only insofar as the majority opinion fails to grant to James M. Symes any part of the $10,000. per year special pension granted on October 23, 1968, after over 50 years[1] of exceedingly valuable service to the Pennsylvania Railroad. The record, including the Appendix, submitted with respect to this special pension, establishes that the principles of equity and fairness require the payment

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1. 47 years and 3 months of continuous active service and approximately 6 additional years as a director prior to his retirement.

of all or part of this pension to him for the reasons stated in part II of the brief filed on his behalf concerning this special pension. I would vacate that portion of paragraph 5 of Order 1087 which denies completely this pension and remand with directions that the $10,000. per year special pension be paid to Mr. Symes for the period since June 21, 1970.

In all other respects, I concur in the majority opinion.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Proceedings for the Reorganization of a Railroad

Bky. No. 70-347

In the Matter of
PENN CENTRAL TRANSPORTATION
COMPANY, *Debtor*

MEMORANDUM AND ORDER NO. 1087

(*Re:* Retirement Programs—
Contingent Compensation)

FULLAM, *J.* January 26, 1973

By virtue of various applications and responses thereto, all of which will be detailed later, the Court is required to make comprehensive rulings governing the status of various retirement programs and related programs of the Debtor. A brief description of the programs in question is set forth below; the actual application of each program to particular employees may vary depending upon hiring date and previous employment history:

1. *Retirement Programs.* The retirement programs detailed below are designed to complement and supplement employee benefits under the Railroad Retirement Act, 45

U.S.C. §228(a), and for the most part are applicable only to employees not covered by collective bargaining agreements.

(a) *Plan for Supplemental Pensions.* This plan is primarily funded with employee contributions. However, the Debtor makes certain annual contributions to insure the actuarial soundness of the plan. Order No. 278 in these proceedings recognizes that the Debtor had no interest in this fund, which, as of April 30, 1972, amounted to $353,-521,624. The Debtor does, however, have the right to terminate the program, in which event the fund would be divided among the participants pro rata.

The only issue now before the Court is whether the plan should be terminated. The Debtor's contributions to the program amount to approximately $2 million per year. The Trustees seek authorization to continue the program in operation.

(b) *Supplementary Benefit Arrangements.* In consequence of the merger between the New York Central and the Pennsylvania Railroad, the Debtor assumed the obligations of two non-contributory plans in effect at the time of the merger: the New York Central supplementary pension plan, and the New Haven pension plan. Under the terms of the respective plans, continuation of the program is optional with the Debtor (NYC ¶¶11 and 12; NH ¶7). The Central plan applies only to those employees who were not entitled to participate in the contributory pension plan of that railroad and who had 20 years' service. The New Haven plan, applicable to "regular salaried supervisors and officials," was the only pension plan of the New Haven.

Forty-seven employees eligible under the Central plan receive a total of about $23,000 annually, approximately $480 per retiree. Three hundred forty-seven former New Haven employees receive a total of $285,000 per year, approximately $825 per retiree. These amounts are gradually diminishing as a result of attrition.

(c) *Interim or Early Retirement Plan.* This program is designed to facilitate the retirement of selected em-

ployees at age 60, rather than at age 65, by assuring total pension benefits equivalent to those which would have been received had retirement been postponed until age 65. Granting of such early retirement is discretionary with the company, but when early retirement has occurred, the company is legally obligated to continue the interim benefits. A similar program, differing somewhat in its mechanics, was inherited from the New York Central in the merger.

For the year 1972, costs to the Debtor under the program amounted to $3,693,000. This cost would decline substantially in future years, unless additional employees are granted early retirement.

Implementation of the early retirement programs produces significant overall economies, making it possible to consolidate certain positions, or to replace highly paid employees with younger, less highly paid substitutes, without the disruptions which would ensue if employees with many years of long and faithful service to the railroad were to be discharged a few years short of retirement. The Trustees estimate that the net savings for the year 1972 amounted to $7.2 million. Projected savings to the year 1980 aggregate some $45 million.

(d) *Additional Pension Benefits*. The Debtor also provides certain additional pension benefits, in two categories: (1) Since 1961, the Debtor has had a policy of crediting prior executive experience with other employers toward the pension entitlements of newly hired executives over 35 years of age earning more than $20,000 annually. The difference between the pension computed with such credit and the pension which would have been paid without such credit is made up from the Debtor's estate. The additional costs under this constructive service policy aggregate approximately $87,000 annually at the present time, and could eventually amount to slightly more than $145,000 annually. The Debtor's constructive service policy follows the universal practice throughout the railroad industry.

(2) Benefits under the Plan for Supplemental Pensions are based upon the employee's average salary over the last five years of employment. Initially, amounts allocated under the Contingent Compensation Plan *(see infra)* were included as salary, for purposes of this computation. However, a 1968 Internal Revenue Service ruling made it necessary to change this policy. Supplement A to the Contingent Compensation Program insures that persons retiring after 1968 will be treated the same as pre-1968 retirees; that is, the Debtor pays the difference between the actual pension benefits and what those benefits would have been if contingent compensation had been included in the computation.

The Trustees propose to continue to carry out all of the foregoing programs.

2. *Contingent Compensation Plan.* This is a complex program under which part of the salary of certain executives, instead of being paid currently in cash, was allotted to them for distribution after retirement. The amounts thus allotted were transferred to a Contingent Compensation Reserve Fund, for investment. This fund now amounts to slightly more than $10 million.

Shortly before the Debtor filed its reorganization petition, the Board of Directors suspended the Contingent Compensation Program, and it remains in suspension to the present date. The details of the program, and the Trustees' proposals with respect to it, will be discussed below.

I. LEGAL PRINCIPLES

Resolution of the conflicting contentions of the parties should begin with recognition of the following general principles:

1. Vested, fully funded contributory pension programs are not affected by the employer's filing for reorganization under §77. The assets in any such pension fund are not

"property of the Debtor." This much appears to be conceded by virtually all of the parties, and, in any event, has been resolved by Order No. 278 in these proceedings.

2. Irrespective of whether a pension plan is funded or unfunded, continuation of pension payments thereunder is generally treated as a necessary and usual operating expense, payable by the Trustees during reorganization as a cost of doing business. Justification for this practice has been found to arise from the fact that the employee's past services helped to create and preserve the estate of the Debtor, *e.g., Bowen v. Hockley, et al.*, 71 F.2d 781 (4th Cir. 1934), or from the necessity of preserving the loyalty and morale of present and future employees, *see: Tate v. New York, New Haven & Hartford R.R.*, 332 F.2d 449 (2d Cir. 1964). However, insofar as current payments are concerned, the Trustees have the power to make adjustments in the amount and manner of payment, so long as this is done on an equitable and non-discriminatory basis. *Tate v. New York, New Haven & Hartford R.R., supra.*

3. Contractual arrangements for deferred compensation, as distinguished from pension programs, may be disaffirmed by the Trustees, and the claims of employees or former employees resulting from such disaffirmance are not entitled to any special priority or acceleration; the claimants are merely general creditors of the Debtor's estate. *Alpert v. New York, New Haven & Hartford R.R.*, 348 F.2d 304 (2d Cir. 1965).

There is thus no difficulty in concluding that the funded pension plan of the Debtor should continue undisturbed, and that the Trustees should continue to make the required contributions. Nor is there any reason for questioning the propriety of the Trustees continuing to carry out the various unfunded pension programs outlined above. These are merely normal operating expenses.

The principal disputes in the present proceeding have to do with the correct treatment of the Debtor's Contingent Compensation Plan, and the legal propriety of imposing a

maximum limitation upon the amount payable to any retiree. These issues will be discussed separately.

II. THE CONTINGENT COMPENSATION PLAN

There are two separate issues, or sets of issues, which must be decided in connection with the Contingent Compensation Program: (1) the status of the Contingent Compensation Fund ("Fund") which was established in connection with this program, and (2) the legal rights of participants in the program (the "Plan"). These issues are, of course, related, in the sense that both the Fund and the Plan must be considered in determining the basic question of whether this is a pension program or some other kind of arrangement; and it is therefore not surprising that the distinctions between the two sets of issues are sometimes obscured in the arguments of counsel. Nevertheless, the distinctions must be kept in mind.

Eligibility for participation in the Plan was limited to salaried employees and officers (except members of the Committee on Organization and Officers' Salaries) designated by the Board of Directors upon recommendation of the Committee. The stated purpose of the Plan was to attract and retain employees in "executive and other key positions." In practice, only persons earning more than $30,000 per year were eligible. A total of 164 employees participated in the Plan (on the date of bankruptcy, the Debtor had more than 92,000 employees, of whom 121 were participants in the Plan).

I agree with counsel for the objecting participants that the express terms of the Plan must be viewed in the light of the manner in which it was implemented. Generally speaking, whenever the union employees of the Debtor obtained wage increases through collective bargaining, non-agreement employees were given salary increases at approximately the same percentage of increase. And whenever such salary increases became effective, employees par-

ticipating in the Contingent Compensation Plan received a part of the increase in cash, and the balance was allotted to them under the Plan. The precise apportionment between cash salary increase and allotment to the Plan was carried out on a sliding scale: for participating employees earning between $30,000 and $39,999 annually, 90% of each increase was paid in cash, and 10% went into the Contingent Compensation Plan. For each $10,000 of salary range, these percentages were shifted by 10%, so that, for employees earning $80,000 or more annually, only 20% of each salary increase was paid in cash, and 80% was allotted to the Plan.

Amounts allotted under the Contingent Compensation Plan were treated as operating expenses of the Debtor, but were not reported as compensation paid to the employees, nor were they then taxable as income to the employees.

The Plan provided that, unless otherwise specified by the Committee, allotments accumulated to the credit of a participant would be paid to him, if living, in 10 equal annual installments commencing after his attainment of age 65; or to his designated beneficiary or his estate, in a lump sum. In no case could payment of the full amount of the accumulated allotment be deferred longer than 10 years and 6 months after his death or, in the case of living participants, 10 years and 6 months after attainment of age 65 or severance from employment, whichever was later.

Under the heading "General Description of the Plan," the Plan specifically states "it will normally provide such individuals with benefits after termination of service *by deferring compensation* until termination of service with the company . . . To achieve this purpose the plan provides *a method of compensating employees*, which differs in several respects from the customary cash payment. . . ." [Emphasis supplied.] From this language, from the Plan as a whole, and from the manner in which the Plan was implemented, it is entirely clear that this was a plan for deferred compensation, and not a pension program. Unquestionably, participants in the Plan have valid and subsisting contractual claims against the Debtor's estate. While there

are provisions in the Plan for forfeiture, no such forfeiture has ever been asserted in the past, nor does anyone now contend that the participants have forfeited their rights under the Plan. Indeed, the Plan provides, in §1401, ". . . no amendment, suspension, or termination [of the plan] may without his written consent, apply to the payment to any participant of any contingent allotment previously made to which he would otherwise be entitled."

The Contingent Compensation Reserve Fund which was established in connection with the Plan stands, however, on an entirely different footing. Section 401 of the Plan provides:

> "Section 401. The Board may authorize the establishment at any time of a contingent compensation reserve fund, hereinafter called the Fund. The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the company. A participant shall have no right in or to any funds or property which may be held in the Fund."

And in §1201:

> "Section 1201. No participant nor any other person shall have any interest in any fund or in any specific asset or assets of the company by reason of amounts contingently allotted to him. . . ."

And, finally, in §1401:

> "Section 1401. . . . No consent of any participant shall be required, however, in connection with any amendment, suspension or termination of the contingent compensation reserve fund, which shall remain subject at all times to the unrestricted control of the company."

The Board of Directors did set up the Fund, as authorized, but not required, by the Plan. It is apparent that this step was taken in order to achieve two basic objectives:

(1) to establish a reserve against the company's contingent liabilities under the Plan; and (2) to provide a mechanism for investing the reserve, and for enabling the participants to obtain the benefits resulting from such investment. Whenever a participant fulfilled all of the requirements of the Plan (*i.e.*, retired and was at least 65 years of age, or died) the total amount payable to him was determined by adding his accumulated allotments which had never been invested in the Fund, to the value represented by his proportionate share of the Fund. In theory, the participants were at risk; if the Fund's investments decreased in value, the participants' deferred compensation might be less than had been allotted to them over the years. As a practical matter, however, the Committee was in a position to terminate the Fund at any time, and presumably would have done so if faced with any genuine prospect of erosion. Actually, the Fund increased in value over the years; but for the intervention of bankruptcy, the deferred compensation which would have been paid to the participants would in most cases have substantially exceeded the amounts originally allotted.

In view of the provisions of the Plan quoted above, the conclusion is inescapable that the participants have no claim whatever to the reserve Fund as such. The assets of the Fund were "property of the Debtor" on the date of bankruptcy, and are now vested in the Trustees. The objectors nevertheless argue that, in the hands of the Trustees, the assets of the Fund are impressed with a trust, or should be so treated on the basis of equitable considerations. In support of this argument, a number of factors are stressed.

(a) The assets of the Fund were always segregated (but the uninvested contingent allotments were commingled with the general assets of the Debtor for brief periods).

(b) From a balance sheet standpoint, the assets of the Fund, and uninvested contingent allotments, did not contribute to the Debtor's net worth (balancing debits and credits were shown). From this, the objectors contend that no creditor of the Debtor ever relied upon the Fund in ex-

tending credit. But this somewhat overstates the case. A creditor who examined the documents establishing the Plan and the Fund would have learned that the Fund assets were unencumbered assets of the Debtor. For present purposes, whether creditors made such inquiry and actually relied upon these assets in extending credit is not necessarily controlling.

(c) At no time, even in the cash crisis which immediately preceded bankruptcy, did the Debtor see fit to use the Fund for corporate purposes, or to borrow against it. While this can be interpreted as showing that the Debtor's managers considered that these assets were held in trust, it may simply provide some insight into their sense of priorities. Moreover, the action of the Board of Directors, purportedly taken on June 20, 1970 (the day before bankruptcy) terminating all further contingent allotments, and directing that the participants' full salaries should thereafter be paid in cash, is persuasive evidence that all concerned understood the vulnerability of the arrangement in the event of bankruptcy.

The objectors further point out that many of the participants have made commitments, in such matters as estate planning and scale of living, in reliance upon anticipated receipt of contingent compensation pursuant to the Plan. This is undoubtedly a valid consideration. It establishes that the participants, like so many others, relied upon the financial soundness of the Debtor. It provides unnecessary further support for the proposition that the participants have valid claims against the Debtor's estate. But this factor must be balanced against countervailing equities in determining the extent to which these claims should be satisfied on a current basis during reorganization, rather than in the reorganization plan.

Originally, the Trustees sought authorization to terminate the Contingent Compensation Plan and disaffirm all obligations thereunder (Document No. 740), thus making the entire fund immediately available for general railroad purposes. Thereafter, recognizing the desirability of im-

proving morale among the present employees, and after extensive negotiations, the Trustees modified their proposal. In their "revised petition . . . concerning Penn Central Transportation retirement programs" (Document No. 1793), the trustees requested leave to continue these programs in effect; and in their "petition . . . for authority to settle claims under the contingent compensation plan" (Document No. 1794), the Trustees sought approval of an agreement embodying the following features: Of the approximately $8.6 million in the Fund as of December 31, 1970, the Trustees would remove approximately $6 million for general railroad purposes, and the balance of $2.6 million would be placed in a reserve fund managed by an independent financial advisor and distributed to the participants according to the terms of the Plan. The proposed allocation of the Fund is calculated to restore to the participants the amounts which they had actually been allotted and had not yet received, or their pro rata share of the Fund as of December 31, 1970, whichever was less (subject, in certain cases, to the $50,000 limitation hereinafter discussed). The participants would not benefit in the growth of the Fund since December 31, 1970. Of the 121 participants in the Plan as of June 21, 1970, 81 agreed to the Trustees' proposal, 33 objected, and 7 expressed no view.

For a variety of reasons, the Trustees' petitions were not immediately acted upon by this Court. The trustees' proposal has now, in effect, been withdrawn, and a further modification thereof substituted. In the meantime, the Fund has increased to approximately $10 million.

The Trustees' present proposal arises by reason of the prospect of a short-range cash emergency. The Trustees now propose to liquidate all of the assets in the Fund, and use the entire sum for current operating expenses, but to undertake, as an administrative obligation, to pay to participants, as cash permits, the same amounts contemplated by the earlier agreement. A further hearing to consider this proposal was held on January 10, 1973, but the line-up of objectors and proponents remains substantially unchanged.

Certain indenture trustees who endorse the legal position taken by the Trustees of the debtor vis-a-vis the participants, pressed further objections to the Trustees' proposed use of the Fund.

Under the Trustees' proposal, the participants would relinquish all claims against the Debtor's estate and the Trustees, except their right to receive amounts equivalent to the unpaid balance of their contingent allotments (or their share of the Fund, valued as of December 31, 1970). I believe this over-simplifies the issue, and arguably, cannot lawfully be imposed upon the participants without their consent. While it is true that the participants have no claim to the Fund itself, it is clear that the amounts of their claims under the Plan are to be measured by their pro rata share of the value of the assets in the Fund. The fact that the Committee could lawfully have refrained from investing any of the contingent allotments does not alter the plain language of the Plan, to the effect that fluctuations in the value of the Fund investments are to be reflected by equivalent changes (here, increases in most cases) in the participants' respective entitlements under the Plan. (Recognition of the validity of this analysis may be implicit in the inclusion of a "most favored nation" clause in the Trustees' proposed agreement; this would purportedly assure settling participants' further payments if the non-settling participants ultimately should fare better than the agreement contemplates.)

Thus, the narrow issue presented is whether, recognizing that all participants have valid lawful claims to the full amount provided for them under the Plan, it would be a proper exercise of discretion to permit present recognition and payment of a portion of each such claim during reorganization, while requiring such claimants to await the adoption of a plan of reorganization before determining the correct treatment of the balance of their claims; and whether the basis on which the Trustees propose to grant such partial recognition is a fair and equitable one.

Since I am satisfied that, strictly speaking, the Trustees would have the right to defer the obligations created

by the Contingent Compensation Plan in their entirety, leaving all participants to the proof of claims program, I am satisfied that the participants would have no just cause for complaint if a part of their claims should now be recognized and paid, so long as substantially equal treatment is afforded them. And since I am also persuaded that efficient operation of the railroad requires that employee morale be maintained at a high level, and that capable employees be encouraged to continue in the employ of the railroad, I am likewise satsified that no creditor or other interest can validly object to the Trustees' proposal to assume the obligation of restoring to the participants the balance of their own 'contributions' under the Plan.

It is correct, as the opponents argue, that under the Trustees' proposal, present employees of the Debtor would receive proportionately larger payments during reorganization (*i.e.*, proportionate to the amounts of their total claims) than would retired participants. This is due to the fact that pre-reorganization payments to retired employees were measured by the full amount of each participant's entitlement; stated otherwise, the retired participants have already received payments which recognized the impact of increased values in the Fund. By the same token, however, the total dollars received by retired participants (in advance of the implementation of a plan of reorganization) will be greater than the amount received by present employees. This, of course, is as it should be, since the retired employees made 'contributions' over a longer period, and in greater amounts, than the present employees.

On balance, I see no inequity in charging amounts which participants have already received from the Contingent Compensation Plan against the amounts which the Trustees will be required to pay in the course of the reorganization.

A further factor bears mention. It is apparent that the Contingent Compensation Plan was carefully drawn with a view toward possible tax consequences. As a general proposition, under the "constructive receipt" doctrine, to

the extent that an employee had a non-forfeitable interest in the allotments, the allotments would have been includible in the employee's gross income in the year of the allotment. *See* Revenue Ruling 60-31, 1960-1 Cum. Bull. 174; Treasury Regulation 1.451-2; *Doty v. U.S.*, 323 F.2d 649 (6th Cir. 1963); *E. T. Sproull v: Commissioner*, 16 T.C.C. 244, *aff'd* 194 F.2d 541 (6th Cir. 1952). It is argued that the provisions of the Plan relating to the Debtor's right to use the Fund's assets for corporate purposes were not necessary to secure preferential tax treatment to the participants; but rather, these provisions were included to insure deductibility by the company of contingent compensation allotments at the time payments were made under the Plan. Assuming this to be true, one could hardly criticize management for such action: no inference of overreaching can be drawn. Moreover, nothing in the record negates the natural assumption that the corporate use provisions were included for the independent purpose of having the Fund's assets available should the need arise. I found unacceptable the suggestion that the clear language of the Plan documents should be brushed aside as unimportant because inserted in part for tax purposes. To put the matter in a nutshell, in order to immunize the allotments from current taxation as income of the participants, and to insure deductibility by the employer, the parties set up a program which was vulnerable in bankruptcy. The Trustees' proposals represent a reasonable attempt to mitigate the adverse impact of bankruptcy, while preserving the tax consequences which were bargained for.

A further argument is made by some of the objectors that they were unaware of all of the ramifications of the Contingent Compensation Plan, believed that their 'contributions' were being held for them in trust, and would have sought employment elsewhere had they known of the true situation. The record does not support these assertions. While it is apparently correct that the participants did not see, and may not have had access to, the documents establishing the Plan, they were furnished, from time to

time, summaries of these documents. These summaries appear in the record as follows: Exhibit C-1, dated December 29, 1952; C-2, dated May 20, 1955; C-3, dated January 20, 1956; C-4, dated September 25, 1963; C-5, dated February 1, 1968; and C-6, dated October 1, 1969. I have carefully reviewed all of these informational summaries and find that, while there are some variations in style and emphasis, all fairly and accurately portray the true nature of the Plan, in reasonably brief and non-technical language. In every case, the concluding section plainly states: "The assets of the contingent compensation reserve fund remain assets of the [railroad company] and subject to the rights of all creditors of the company. . . ." Moreover, there is actually no evidence in the record that any participant misunderstood the situation.

III. THE $50,000 LIMITATION

By Order No. 12 in these proceedings, I directed that, until further order of Court, no payments be made from the estate of the Debtor to or on behalf of persons no longer employed by the Debtor on a full-time basis, at a rate in excess of $50,000 per annum. This Order remains in effect, and the Trustees propose to incorporate that limitation in the interim arrangements now under discussion.

As to six participants in the Contingent Compensation Plan (Messrs. Symes, Greenough, Saunders, Bevan, Perlman and Smucker), the effect of this limitation would be to reduce or eliminate their current participation in the Contingent Compensation Plan, by reason of the amounts being paid them currently under various aspects of the pension program. At the present time, by reason of Order No. 12, no retired employee is receiving more than $50,000 per year, in the aggregate, from the Debtor's retirement and contingent compensation programs. Counsel for all parties appear to be in agreement that participation in the fully funded plan (the Plan for Supplemental Pensions) cannot

be thus limited. Mr. Symes is entitled to receive $52,776.12 per year from the funded plan, and Mr. Greenough is entitled to receive $68,478.68 per year from that program. Under the Trustees' proposal Mr. Greenough's contingent compensation would be the value of his units, $222,140.87, less contingent compensation paid, $200,000, or $22,214.08, divided by the appropriate number of payments remaining to be paid under the Plan. The $50,000 limitation would preclude payment of that amount. Mr. Symes is entitled to no contingent compensation under the Trustees' proposal, since he has already received far more than either his original allotments or the value of his units on December 31, 1970. A special $10,000 per year benefit granted Mr. Symes by the Board after his retirement would also be precluded by the $50,000 limitation. Similarly, Mr. Smucker would not receive $5,515 from the unfunded programs that he would otherwise be entitled to, nor would he receive his contingent compensation payment computed at the valuation date of $11,154.15 per annum.

In the case of Mr. Perlman, his entitlement under the funded plan is $41,709.84 per year, which is being paid him. But for the $50,000 limitation, he would be entitled, under the Trustees' proposal, to receive $23,297.22 per year from the Contingent Compensation Plan. Application of the $50,000 limitation would reduce his participation in the Contingent Compensation Plan to approximately $8,200 annually.[1]

In the case of Mr. Bevan, his entitlement under the funded plan is $27,437.27 annually, and under other retirement programs an additional $50,194.24 annually. By reason of the application of the $50,000 limitation, his participation in the unfunded pension programs would be reduced,

1. Shortly before reorganization, the Board of Directors entered into a further contract with Mr. Perlman, under which he would have performed services as a consultant, at a salary of $50,000 per year. This contract was disaffirmed by the Trustees before it became effective. Issues arising out of this disaffirmance are not before the Court at this time.

and his participation under the Contingent Compensation Plan would be eliminated (*i.e.*, insofar as current payments are concerned).

In the case of Mr. Saunders, he is entitled to receive annually $12,247.72 from the funded plan and $78,344.16 from other retirement programs. Application of the $50,000 limitation reduces Mr. Saunders' payments from the unfunded programs and eliminates current participation in the Contingent Compensation Plan. His entitlement under the Trustees' settlement formula would otherwise be $41,200 annually.

In the aggregate, application of the $50,000 limitation would reduce the amount payable on a current basis, under the contingent compensation plan proposal of the Trustees, by approximately $102,000 annually, and would reduce payments from the Debtor's estate under the unfunded retirement programs and otherwise in the amount of about $78,000 for the current year (this latter amount would fluctuate from year to year).

To the extent that the Trustees are required, or find it advisable, to establish a reserve to meet the obligations they propose to assume under the Contingent Compensation Plan, application of the $50,000 limitation would reduce the amount of the required reserve by approximately $1 million.

I have carefully considered all of the arguments advanced on all sides of this question, and have concluded that the $50,000 limitation originally imposed should remain in effect, insofar as that limitation can be achieved through payments within the control of the Trustees. That is to say, while neither the Trustees nor this Court can lawfully interfere with entitlements under the Plan for Supplemental Pensions (the fully funded plan), no payments should be made from the Debtor's estate during reorganization which would, as to any retiree, result in a total post-retirement income from all sources related to the Debtor (*i.e.*, the funded plan, the unfunded retirement programs, and the Contingent Compensation Plan) in excess of $50,000 per year.

In my view, it would be unconscionable to permit the payment in full of all retirement and deferred compensation, no matter how generous the amount, while the Debtor is unable to pay current taxes, or, for example, to pay pre-bankruptcy personal injury claims for which it is legally liable. Conversely, elimination of all pension and deferred compensation payments from the Debtor's estate would be unduly harsh and, as noted above, would be likely to interfere with the smooth functioning of the railroad. The only acceptable solution is to impose a limitation of some kind.

It has been suggested that the only fair way to impose such a limitation would be on a percentage basis. I reject this approach, believing it would probably involve greater inequities than the flat limitation proposed. Moreover, a percentage reduction might make it difficult for retirees at the lower end of the scale to maintain themselves comfortably, and would permit payments to retirees at the higher end of the scale at unreasonably generous levels. While it is true that the flat $50,000 limitation has a greater dollar impact upon some retirees than others, it assures all retirees of a reasonably comfortable standard of living; moreover, for the most part, the retirees at the higher end of the scale achieved that position as the result of pre-bankruptcy salary policies which are most clearly vulnerable to criticism. On balance, I believe the $50,000 limitation represents an acceptable resolution of these competing considerations.

IV. IMPLEMENTATION

The Trustees originally proposed to set aside $2.6 million of the assets of the Contingent Compensation Reserve Fund in a separate fund, as a reserve against the payments which they are willing to assume under the Plan. They now propose to eliminate this reserve, and to make payments under the Plan "as cash permits." For the reasons previously discussed, it is clear that the entire Fund may be utilized, free and clear of claims of the participants. The

question remains, however, whether it would be desirable for the Trustees to expend the entire Fund to meet other current operating expenses, without regard to the obligations which the Trustees propose to assume.

It may well be that, if it should become necessary to choose between using the entire Fund or shutting down the railroad, the former would be the appropriate choice. But until such a choice becomes absolutely necessary, on the basis of actual rather than projected figures, I believe the $2.6 million should be held intact, as a reserve to meet the obligations assumed by the Trustees.

The Trustees' settlement proposal would have required participants to release all further claims arising under the Plan in order to receive current payments computed on the basis of (a) their total allotments, or (b) their share of the value represented by the Fund as of December 31, 1970, whichever was less; all payments previously received to be credited on account. They would thus have forever lost any right to claim a share in the incremental values in the Fund. On the other hand, they would have received payment during reorganization, and would have shared in any increase in the $2.6 million set aside for their benefit.

The arrangement approved herein embodies the following features: (1) the same formula for determining current payments is retained; (2) the validity of the participants' claims for the full amounts due under the Plan, calculated as of December 31, 1970, is preserved; (3) questions as to the participants' rights to share in the growth of the Fund from December 31, 1970 to the present date remain open for future determination; (4) $2.6 million of the Fund will not be used for operating expenses unless so ordered by this Court in the case of absolute necessity; (5) to the extent that the $2.6 million reserve now being established may grow through investment, and is not used for operating expenses, the Trustees may at some future time be authorized to permit the participants to share in such growth.

I do not now decide that the participants could not lawfully be required to give up all further claims in exchange for current partial payment, but merely that there is room for doubt on the subject, and that the arrangements outlined above seem preferable.

Certain indenture trustees take the position that, while the entire Fund belongs to the Debtor's estate, free of any claims of the participants, it is subject to the lien of the trustees' certificates guaranteed by the federal government, and cannot be used to meet operating expenses except on the strength of a present decision by this Court that the lien of the trustees' certificates, as to encumbered assets of the Debtor, is reduced by that amount. I do not believe that issue is ripe for decision at this time. The government does not object to the Trustees' proposal, and I am satisfied that the use of unencumbered assets to meet operating expenses is entirely consistent with the Emergency Rail Services Act of 1970 (45 U.S.C. §§661-69) and the terms of the government's guarantee. For this Court now to attempt to forecast all of the possible legal consequences would serve no useful purpose.

V. CONCLUSIONS

1. The fully funded Plan for Supplemental Pensions should remain in full force and effect, unimpaired by the Debtor's bankruptcy. The Trustees should be authorized to continue to make contributions thereto, as a cost of doing business.

2. Subject to the limitation hereinafter mentioned, the Trustees should continue to make payments required by the various unfunded pension programs, as a cost of doing business.

3. Participants in the Contingent Compensation Plan have no legal or equitable interest in or claim to the assets in the Contingent Compensation Reserve Fund. Each participant in the Contingent Compensation Plan has a valid claim for the full amount to which he is entitled under

the terms of the Plan, but the Trustees should be authorized and directed to recognize such claims during reorganization only to the extent represented by the formula proposed by the Trustees in settlement (*i.e.*, reimbursement of accrued allotments, or pro rata share of the Fund as of December 31, 1970, whichever was less); and such claims should be paid during reorganization only as cash permits. Unless and until otherwise ordered by this Court, the Trustees should set aside and reserve the sum of $2.6 million in order to meet these payments.

4. During reorganization, the Trustees should make no payments from the estate of the Debtor (whether by reason of unfunded retirement programs, or the Contingent Compenstion Plan) where the effect of such payment would be that the aggregate amount received by a retired employee from all sources related to the Debtor (*i.e.*, the Plan for Supplemental Pensions, unfunded retirement programs, and the Contingent Compensation Plan) would exceed $50,000 per annum).

Appropriate orders will be entered in conformity with the views expressed herein.

ORDER NO. 1087

Authorizing the Trustees to Carry Out the Provisions of Certain Pension Programs, and to Make Certain Payments on Account of Obligations Arising Under the Contingent Compensation Plan.

AND NOW, this 26th day of January, 1973, upon consideration of the various Petitions of the Trustees relating to the retirement and contingent compensation programs of the Debtor (Documents Nos. 740, 1226, 1793 and 1794), and after hearings thereon duly noticed, it is ORDERED:

1. The Trustees are authorized to continue in effect the Plan for Supplemental Pensions, in conformity with Order No. 278, and to make all payments required to implement the same.

2. Subject to the limitation set forth in paragraph 5 of this Order, the Trustees are authorized to continue in effect all of the existing pension programs and policies of the Debtor, and to make all payments required to implement the same.

3. Subject to the limitation set forth in paragraph 5 of this Order, from time to time during reorganization, as cash permits, the Trustees are authorized to pay to eligible participants in the (former) Contingent Compensation Plan of the Debtor amounts determined—in each case by the following formula, viz, (a) the lesser of (i) the total allocations to such participant, or (ii) an amount equal to the value of such participant's share of the Contingent Compensation Reserve Fund as of December 31, 1970, less (b) the aggregate amount of payments heretofore made to such participant or account of his participation. All payments to participants during reorganization shall be made on a pro rata basis in relation to the amounts thus determined. Except as herein provided, disposition of all further claims on behalf of participants in the (former) Contingent Compensation Plan of the Debtor is deferred pending adoption of a reorganization plan.

4. It is adjudged and declared that the assets in the Contingent Compensation Fund are the property of the trustees, free and clear of all claims, legal or equitable, of the participants or former participants in the Contingent Compensation Plan.

5. In no event shall the Trustees make any payment to or on behalf of any former officer or employee of the Debtor where the effect of such payment would be the receipt by such former officer or employee, from the Plan for Supplemental Pensions, all other unfunded retirement programs of the Debtor, and the Contingent Compensation Plan, in the aggregate, of more than $50,000 per annum.

JOHN P. FULLAM, J.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1081, 73-1098, 73-1205,
73-1207 and 73-1208

IN THE MATTER OF: PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

TWENTY-ONE RETIRED EMPLOYEES, Appellants in No. 73-1081
DAVID C. BEVAN, APPELLANT in No. 73-1098
STUART T. SAUNDERS, Appellant in No. 73-1205
ARTHUR J. GREENOUGH, Appellant in Nos. 73-1207 and 73-1208

(Bankruptcy No. 70-347)

SUR PETITIONS FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges*

The petitions for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,

Dated: October 9, 1973

Judge

Appendix D

THE PENNSYLVANIA RAILROAD COMPANY—
BOARD—November 26, 1952

THE CONTINGENT COMPENSATION PLAN

of

THE PENNSYLVANIA RAILROAD COMPANY

GENERAL DESCRIPTION OF THE PLAN

The purpose of this Plan is to assist The Pennsylvania Railroad Company in attracting and retaining individuals for executive and other key positions. It will encourage such individuals to continue in the Company's employ and will make available to the Company their services in consultative or advisory capacities after retirement. It will also help to insure that the services of such individuals *will not be available to competitors of the Company*. To achieve this purpose the Plan provides another method of compensating employes, which differs in several respects from the customary cash payment. An employe participating in this Plan will not become entitled to receive any compensation hereunder until he has fulfilled certain conditions, the principal one being continuance in the service of The Pennsylvania Railroad Company until retirement or death.

As more fully described below, the Board of Directors, from time to time, may allot to any employe an amount representing contingent compensation subject to the terms and conditions set forth herein. At the discretion of the Board an amount equivalent to such allotment, or any part thereof, may be transferred to a reserve fund and invested; and to the extent of such transfer, the payments to a participant shall be measured by the value of the reserve fund.

However, the assets held in the reserve fund will at all times be available for any corporate purpose.

After retirement the compensation contingently allotted to a qualifying employe will be paid to him in installments, subject to certain conditions. In the event of death, before or after retirement, payments will be made to the employe's beneficiary.

ARTICLE I

DEFINITIONS

Section 101. Whenever used in this Plan, unless the context otherwise requires, the term or terms:

(a) "Plan" shall mean The Contingent Compensation Plan of The Pennsylvania Railroad Company as described in this instrument.

(b) "Company" shall mean The Pennsylvania Railroad Company or any successor company.

(c) "Board" shall mean the Board of Directors of the Company.

(d) "Committee" shall mean the Special Committee of the Board on Organization and Officers' Salaries.

(e) "Employe" shall mean any person employed by the Company who receives a regular stated compensation, other than a pension or retainer, and shall include officers, and directors who are employed as officers.

(f) "Participant" shall mean any employe or former employe for whose account a contingent allotment has been made pursuant to this Plan, provided such contingent allotment has not been wholly paid or forfeited.

(g) "Termination of Service" or similar expression shall mean the termination of the participant's

employment at a regular stated compensation; except that a participant who is on leave of absence, whether with or without pay, shall not be deemed to have terminated his service.

(h) "Retirement" shall mean a termination of service by reason of age or disability under circumstances which would render a party to the Supplemental Pension Plan of the Company eligible for a pension.

Section 102. Unless the context requires otherwise, the masculine pronoun shall include the feminine, words used in the singular shall be construed as though also used in the plural, and words used in the plural shall be construed to include the singular.

ARTICLE II

ELIGIBILITY AND CONTINGENT ALLOTMENTS

Section 201. Any employe shall be eligible for contingent allotments under the Plan if he is not a member of the Committee.

Section 202. At any time the Committee may recommend to the Board that an eligible employe be allotted contingent compensation subject to the terms and conditions of the Plan. Such recommendation may be limited to one or more eligible employes or may include all eligible employes as a class. The contingent allotments need not be at the same percentage of salary for each employe and may be expressed either as a percentage of salary or as a dollar amount. If the Board approves a contingent allotment to an employe, such participant shall be notified promptly in writing of the amount and effective date thereof.

Section 203. If the amount contingently allotted to any participant is later determined to exceed the limit prescribed pursuant to any law, Federal or State, it shall be reduced to the maximum lawful amount.

ARTICLE III

FORFEITURES

Section 301. Any participant who is discharged for any reason from the service of the Company, whether such discharge be based upon reasonable cause or not, shall forfeit all amounts contingently allotted to him and he shall receive no payment whatsoever under the Plan.

Section 302. Any participant who terminates his service with the Company, otherwise than as a result of death or retirement, without the express consent of the Company evidenced by resolution duly adopted by the Board, shall forfeit all amounts contingently allotted to him and he shall receive no payment whatsoever under the Plan.

Section 303. Any participant who shall have become entitled to any payment under the Plan shall forfeit all contingent allotments remaining unpaid if he engages in, or continues to engage in, any occupation or activity deemed by the Board to be against the best interests of the Company, after receipt of notice from the Board requesting him to cease or desist therefrom.

Section 304. Any participant who shall have become entitled to any payment under the Plan shall forfeit all contingent allotments remaining unpaid if he shall refuse to render such consultative and other advisory services to the Company as shall be reasonably requested by the Board, from time to time, for which reasonable compensation as determined by the Board, shall be payable.

ARTICLE IV

CONTINGENT COMPENSATION RESERVE FUND

Section 401. The Board may authorize the establishment at any time of a Contingent Compensation Reserve Fund, hereinafter called the Fund. The Fund shall not be a trust fund and the assets therein shall be available at all times for any corporate purpose of the Company. A partici-

pant shall have no right in or to any funds or property which may be held in the Fund.

Section 402. From time to time the Board may authorize the transfer to or from the Fund of an amount equal to all or a part of the amount of the contingent allotments to participants in the Plan. Such transfer shall be made on the next succeeding valuation date, as defined in Section 406 hereof; provided however, if such transfer shall be authorized on a valuation date, it shall be made immediately.

Section 403. The amounts in the Fund may be invested in the usual manner; and the income from such investments and accretions to the Fund shall be retained therein and may be reinvested in like manner.

Section 404. The Fund shall be reduced by an amount equivalent to any contingent allotments paid or forfeited under this Plan to the extent that such contingent allotments had been represented in the Fund and expressed as units thereof; the amount of such reduction shall be determined by reference to the value of such units on the valuation date next preceding the date of payment or forfeiture.

Section 405. In determining the valuation of that portion of a contingent allotment represented by an equivalent amount in the Fund, said Fund shall at all times be divided into units of equal value.

Upon the establishment of the Fund, the number of the units into which it is to be divided shall be determined; thereupon, to the extent that the contingent allotment of a participant is represented in the Fund, his contingent allotment shall be expressed as the number of units which bears the same proportion to the total number of such units as the amount of his contingent allotment represented in the Fund bears to the total contingent allotments so represented.

When any further monies are transferred to the Fund, the amount so transferred shall be equated to the then

value of each unit or a multiple thereof, and the number of units of the Fund shall be increased accordingly; and the amount of the contingent allotments represented thereby shall be expressed as a number of such units. From time to time, the units of the Fund may be uniformly divided or combined into a greater or lesser number of units.

Section 406. As of the close of business on March 31st, June 30th, September 30th and December 31st of each year, or if any of such dates is not a business day, the last business day preceding such date, the valuation of the Fund shall be determined in the manner described in Article V hereof. Such valuation may also be determined as of the last business day of any calendar month. Each such date as of which the valuation of the Fund is determined shall be known as a valuation date.

Section 407. The value of each unit into which the Fund is divided as hereinbefore provided, shall be determined on each valuation date by dividing the valuation of the Fund by the number of units into which the Fund is then divided.

Section 408. The Board at its sole option may terminate or suspend the operations of the Fund. As of the date of any termination or suspension there shall be a valuation of the Fund in the manner described in Article V hereof, and to the extent that the contingent allotments of a participant have been expressed as units they shall thereupon be expressed as the amount at which the units were valued. Upon fulfilling all the conditions of the Plan, such amounts, together with all contingent allotments never represented in the Fund, shall be paid to the participant as hereinafter provided. Having suspended or terminated the Fund, the Board at any time may reinstate the Fund by transferring thereto an amount equivalent to all or a portion of the unpaid contingent allotments of participant and the provisions of the Plan relating to the Fund shall again become applicable.

ARTICLE V

METHOD OF VALUATION OF RESERVE FUND

Section 501. The following method shall be used in the valuation of the Fund.

(a) Securities listed or traded on the New York Stock Exchange, the New York Curb Exchange, or other recognized exchanges, shall be valued at their last sale prices on the valuation date. If no sale has been reported for that day, the mean between the closing bid and asked prices shall be used.

If there have been no recorded sales of a security listed or traded on a recognized exchange on the valuation date and if the closing bid and asked prices do not fairly indicate the actual market value of a security, or if there is not both a bid and asked price, then the security shall be valued by a quotation to be obtained from a reputable broker or investment banker as of the close of business on the valuation date.

Securities not listed or traded on recognized exchanges shall be valued either by taking the mean between the bid and asked prices or by quotations which may be obtained from reputable brokers or investment bankers as of the close of business on the valuation date, or as provided in sub-section (b) hereof. United States Series G, Savings Bonds, or other United Sates bonds with the same or substantially the same redemption provisions, shall be valued at par.

(b) For the purpose of sub-section (a), sales and bid and asked prices reported in newspapers of general circulation, published in Philadelphia or New York, or in the standard financial periodicals, or in the records of such exchanges, any one or more of which may be selected, shall be accepted as evidence thereof.

(c) An investment purchased, and awating payment against delivery, shall be included for valuation purposes as a security held, and the cash accounts shall be adjusted by the deduction of the purchase price, including brokers' commissions and other expenses of the purchase.

(d) An investment sold but not delivered pending receipt of proceeds shall be valued at the net sales price after deducting brokers' commissions and other expenses.

(e) For the purpose of valuation of an investment, except an investment sold but not delivered, it shall be unnecessary to deduct from the value ascertained as above indicated brokers' commissions or other expenses which would be incurred upon a sale thereof.

ARTICLE VI

PAYMENTS AFTER RETIREMENT

Section 601. Upon the fifteenth day of the first month which shall begin at least six months after the date of his retirement, and annually thereafter in each of the three succeeding years, the Company shall pay to a participant a sum computed as follows: on the first payment date the Company shall pay to the participant one-fourth of the amount of his contingent allotments; on the second payment date it shall pay one-third of the then remaining amount of his contingent allotments; on the third payment date it shall pay one-half of the then remaining amount of his contingent allotments; and on the fourth payment date it shall pay the remaining amount of his contingent allotments. In each case, to the extent that his contingent allotments have been represented in the Fund and are expressed as units thereof, the amount of the contingent allotments shall be determined by reference

to the value of such units on the valuation date next preceding the date of payment.

Section 602. The Committee may in its sole discretion provide that the payments shall be made at other times in other amounts or in a lesser number or a greater number of installments in the case of a particular participant, but in no event shall the full payment be postponed beyond ten years and seven months from the date of the employe's retirement.

ARTICLE VII

PAYMENTS IN THE CASE OF DEATH

Section 701. If the death of a participant should occur prior to his retirement, there shall be paid a sum equivalent to the amount of his contingent allotments, provided that, to the extent his contingent allotments have been represented in the Fund and are expressed as units thereof, the amount of the contingent allotments shall be determined by reference to the value of such units upon the valuation date next preceding the date of payment. Such payment shall be made to the beneficiary of the participant within six months after date of death, provided, that in an individual case payment may be made at such times as shall be determined by the Committee in its discretion. In no case shall full payment thereof be postponed beyond ten years and seven months from the date of the participant's death.

Section 702. In the event of death of a participant after retirement, any allotments remaining unpaid shall be paid to his beneficiary at such times and in such amounts as would otherwise have been paid to the participant, provided, however, that the Committee shall possess discretion to accelerate the time of payment of any allotment remaining unpaid after the death of the participant.

Section 703. Designation of a beneficiary shall be made by a participant and any such designation may be

revoked or changed by him at any time. Each designation, revocation, or change of beneficiary shall be made in writing upon a prescribed form and shall be filed with the Committee and shall not be effective unless and until it is so filed prior to the death of the participant. A participant may designate one or more beneficiaries and where more than one beneficiary has been so designated, payments shall be divided equally among them unless the participant directs otherwise in his designation. If for any reason (including death prior to that of the participant) the designation of any such beneficiary is not effective at the date of the participant's death, all amounts which would otherwise be payable to such beneficiary shall be paid to the estate of the participant, unless the participant directs otherwise in his designation. If no beneficiary has been effectively designated, all the amounts herein provided to be paid to a beneficiary shall be paid to the estate of the participant.

ARTICLE VIII

PAYMENTS UPON CONSENTED TERMINATION

Section 801. If a participant terminates his service with the Company prior to retirement with the express consent of the Company evidenced by resolution duly adopted by the Board the amount of his contingent allotments shall be paid to him in accordance with the provisions of Article VI following the date upon which he could have retired had he remained in the service of the Company, and in accordance with the provisions of Article VII in the event of his death prior or subsequent to such date. Provided, however, in a particular case the Committee in its discretion may authorize payment to the participant upon termination of service either in one lump sum or in installments.

ARTICLE IX

PAYMENTS DUE INFANTS OR INCOMPETENTS

Section 901. If any person to whom an amount is payable hereunder is an infant, or is legally declared incompetent, the Committee shall have power to cause the payments becoming due to such person to be made to another for his benefit without responsibility of the Committee to see to the application of such payments. Payments made pursuant to such power shall operate as a complete discharge of the Company.

ARTICLE X

INALIENABILITY OF BENEFITS

Section 1001. The right (contingent or otherwise) of any person to receive any payment under the provisions of this Plan shall not be subject to alienation or assignment, and if such person shall attempt to assign, transfer or dispose of such right, or should such right be subjected to attachment, execution, garnishment, sequestration or any legal, equitable or other process, it shall *ipso facto* pass and be transferred to such one or more persons as may be appointed by the Committee from the beneficiaries, spouse, dependents or relatives of the person with respect to whom such right arises, in such shares and proportions as the Committee may determine; provided, however, that notwithstanding any of the foregoing conditions or any appointments so made, the Committee, in its sole discretion, may reappoint such person to receive any payment thereafter becoming due, either in whole or in part. Any appointment made by the Committee may be revoked by it at any time and a further appointment made.

ARTICLE XI

RESTRICTION UPON PAYMENTS

Section 1101. Notwithstanding anything to the contrary herein provided, no payments shall be made to any person under this Plan which would violate any provision of any law. In any case in which payment of an amount provided for in this Plan would be violative, in whole or in part, of any law, the amounts to be paid hereunder shall be reduced, deferred or otherwise made to conform to the provisions of any such law.

ARTICLE XII

RIGHTS OF PARTICIPANTS

Section 1201. No participant nor any other person shall have any interest in any fund or in any specific asset or assets of the Company by reason of amounts contingently allotted to him, *nor any right to receive any distribution under the Plan except as and to the extent expressly provided in the Plan.* Nothing in the Plan shall be deemed to give any officer or any employe of the Company any right to participate in the Plan, except to the extent that contingent allotments shall have been made to him in accordance with the provisions of the Plan.

Section 1202. Neither the adoption of the Plan, the making of any contingent allotments, nor any related action of the Board or the Committee shall be held or construed to confer on any person any legal right to continue as an employe of the Company.

ARTICLE XIII

POWERS OF COMMITTEE

Section 1301. The Committee shall be charged with the administration of this Plan and have such powers as may be conferred upon it by this Plan. It shall have all

powers which may be necessary to discharge such duties including, but not by way of limitation, the power to interpret and construe this Plan, to determine all questions of the status and rights of participants and others hereunder and, in general, to decide any dispute arising under this Plan; and any such interpretation, construction, determination or decision by the Committee shall be final and binding upon all participants and all other persons having any interest or claim under the Plan. The Committee may adopt such rules and regulations as it deems desirable for the administration of its power and duties under this Plan and may appoint any person, whether or not a member of the Committee, to be its Secretary, Assistant Secretary, or agent. It may delegate to any agent, officer, or committee of officers, its duties and powers, ministerial or discretionary, except those acts the performance of which by the Committee is expressly provided for in the Plan.

ARTICLE XIV

AMENDMENT AND DURATION OF PLAN

Section 1401. The Board may, from time to time, amend, suspend, or terminate this Plan in whole or in part, or if terminated, may reinstate any or all of the provisions of the Plan, *except that no amendment*, suspension, or termination may, without his written consent, apply to the payment to any participant of any contingent allotment previously made to which he would otherwise be entitled. No consent of any participant shall be required, however, in connection with any amendment, suspension or termination of the Contingent Compensation Reserve Fund, which shall remain subject at all times to the unrestricted control of the Company.

RESOLVED that, effective 1st December, 1952, the Board authorizes the allotment—

(1) to all officers who were receiving $30,000. or more per annum on the 30th of September, 1952, of contingent compensation at an annual rate of 6½% of their present salaries, and

(2) to all officers whose compensation was increased to $30,000., effective 1st October, 1952, of contingent compensation at an annual rate equivalent to the amount by which such increase was less than a 6½% increase of their salaries in effect on the 30th of September, 1952;

such allotments to be made in 24 semi-monthly installments each year and to be subject to all the terms and conditions of this Company's Contingent Compensation Plan.

RESOLVED that the Board authorizes the establishment of a Contingent Compensation Reserve Fund in accordance with the provisions of Section 401 of this Company's Contingent Compensation Plan.

RESOLVED that until rescinded or modified by further action, the Board authorizes, in accordance with the provisions of Section 402 of this Company's Contingent Compensation Plan, the transfer to the Contingent Compensation Reserve Fund of amounts equivalent to the allotments of contingent compensation made with respect to participants, to the extent that such allotments are convertible into whole units as determined pursuant to the Plan. Such transfers may be made upon any valuation date as provided in the Plan.